INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
State statute the validity of which is involved	2
Date of the judgment and application for appeal	8
Nature of the case and rulings below	8
Federal questions involved	11
Substantial nature of federal questions	13
Appendix "A"—Opinion of the Supreme Court of Georgia	19

Statutes Cited

Act of the Georgia Legislature (Georgia Laws of 1943, p. 185, et seq.):	
Sec. 1	5
Sec. 11	5
Sec. 13	6
Sec. 18	7
Sec. 21	7, 17
Sec. 23	7
Sec. 32	8, 18
Constitution of Georgia (Georgia Laws of 1943, page 43):	
Sec. 1	2, 14
Sec. 2	16
Constitution of the United States, Article I, Section 10	11, 12
United States Code Annotated, Title 28, Section 344a, as amended by the Act of January 31, 1928) Judicial Code, Section 237, Chap. 14, par. 4, 45 Stats. 54)	1

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 976

JOHNNY J. JONES,

Appellant,

vs.

M. GARY WHITTLE, AS SHERIFF OF RICHMOND COUNTY, GEORGIA.

JURISDICTIONAL STATEMENT FILED IN SUPPORT OF A PETITION FOR APPEAL IN THE ABOVE-STATED MATTER.

This jurisdictional statement is made, presented and filed pursuant to No. 12 of the rules of the Supreme Court of the United States.

1

The statutory provision giving to the Supreme Court of the United States jurisdiction of this appeal is paragraph 344 of Title 28 of the United States Code Annotated, subsection (a); as amended by Act of Congress January 31st, 1928. (Judicial Code Section 237, Chapter 14, Paragraph 1, 45th Statutes 54.)

2

The Georgia state statute, the validity and constitutionality of which is involved in this case, is an amendment to the Constitution of Georgia (Georgia Laws of 1943, page 43) which reads as follows:

"Be it resolved by the General Assembly of the State of Georgia:

"Section 1. Upon approval of this Resolution in the manner hereinafter provided, that Paragraph XII of Section 1 of Article V of the Constitution of the State of Georgia, as follows:

" '2-2612. (6481) Paragraph XII. Reprieves and Pardons.

" 'He shall have power to grant reprieves and pardons, to commute penalties, remove disabilities imposed by law, and to remit any part of a sentence for offenses against the State, after conviction, except in cases of treason and impeachment, subject to such regulations as may be provided by law relative to the manner of applying for pardons. Upon conviction for treason, he may suspend the execution of the sentence and report the case to the General Assembly at the next meeting thereof, when the General Assmbly shall either pardon, commute the sentence, direct its execution, or grant a further reprieve. He shall, at each session of the General Assembly, communicate to that body each case of reprieve, pardon, or commutation granted, stating the name of the convict, the offense of which he was convicted, the sentence and its date, the date of the reprieve, pardon, or commutation, and the reasons for granting the same. He shall take care that the laws are faithfully executed, and shall be a conservator of the peace throughout the State.'

"be, and the same is hereby amended, *by striking Paragraph XII OF Section 1 of Article V*, as above set out, in its entirety, and that in lieu thereof a new paragraph to be substituted, to be known as Paragraph XII of Section 1 of Article V, and which shall read as follows:

" 'The Governor shall have power to suspend the execution of a sentence of death, after conviction, for offenses against the State, until the State Board of Pardons and Paroles, hereinafter provided, shall have an opportunity of hearing the application of the convicted person for any relief within the power of such Board, or for any other purpose which may be deemed necessary by the Governor. Upon conviction for treason the Governor may only suspend the execution of the sentence and report the case to the General Assembly at the next meeting thereof, when the General Assembly shall either pardon, commute the sentence, direct its execution or grant a further reprieve. The Governor shall, at each session of the General Assembly, communicate to that body each case of suspension of sentence, stating the name of the convict, the offense for which he was convicted, the sentence and its date, the date of the reprieve or suspension, and the reasons for granting the same. He shall take care that the laws are faithfully executed, and shall be a conservator of the peace throughout the State. There shall be a State Board of Pardons and Paroles composed of three members, who shall be appointed by the Governor and confirmed by the Senate. Appointments made at times when the Senate is not in session shall be effective ad interim. The first members shall be appointed for terms of three, five and seven years, respectively, to be designated by the Governor, and all subsequent appointments shall be for a period of seven years, except in case of an unexpired term. The Governor shall not be a member of the State Board of Pardons and Paroles. The

members of the State Board of Pardons and Paroles shall each receive an annual salary of $5,000.00, payable monthly. The State Board of Pardons and Paroles shall have power to grant reprieves, pardons and paroles, to commute penalties, remove disabilities imposed by law, and may remit any part of a sentence for any offense against the State, after conviction, except in cases of treason or impeachment, and except in cases in which the Governor refuses to suspend a sentence of death. Provided that such board shall act on all applications within 90 days from the filing of same, and in all cases a majority shall decide the action of the Board. Except if any member for any cause is unable to serve in any case involving capital punishment, the Governor shall act as the third member of said Board and the action so taken in such instances shall be by unanimous vote. The State Board of Pardons and Paroles shall at each session of the General Assembly communicate to that body in full detail each case of pardon, parole, commutation, removal of disabilities or remission of sentences granted, stating the name of the convict, the offense for which he was convicted, the sentence and its date, the date of the pardon, parole commutation, removal of disabilities or remission of sentence and the reasons for granting the same, and the State Board of Pardons and Paroles may make rules and regulations as may be authorized by law. The first Board of Pardons and Paroles under this provision may be those in office under an Act of the General Assembly creating such a Board existing at the time of the adoption of this amendment, which, if so existing shall be in lieu of such a Board to be created by the General Assembly subsequent to the adoption of this amendment, and which Board shall have all the rights, privileges, powers and duties the same as if it was so subsequently created, and the terms of members of such Board shall date from the time specified in the existing Act of the General As-

sembly. The General Assembly may enact laws in aid of, but not inconsistent with, this amendment.'

"Section 2. When said amendment shall be agreed to by two-thirds vote of each House, with the 'ayes' and 'nays' thereon entered on their respective journals, it shall be published and submitted to the qualified voters of Georgia for ratification or rejection at the next general election at which constitutional amendments may be voted on, and if adopted, the result shall be declared and the amendment proclaimed as a part of the Constitution of the State of Georgia, as provided by the Constitution and laws relating to constitutional amendments." (Emphasis ours.)

and an act of the Georgia Legislature (Georgia Laws of 1943, page 185, et seq.) the pertinent and applicable portions of which are as follows:

"Section 1. There shall be a State Board of Pardons and Paroles, which shall consist of three members appointed by the Governor, subject to the confirmation of the Senate."

"Section 11. The State Board of Pardons and Paroles shall have power to grant reprives, pardons and paroles, to commute penalties, to remove disabilities imposed by law, and to remit any part of a sentence for offenses against the State, after conviction, except in cases of treason and impeachment, and except in cases in which the death sentence has been imposed and the Governor refuses to suspend the execution of such death sentence to enable the Board to consider and pass upon the same. In all cases when the governor has suspended the execution of a death sentence to enable the board to consider and pass on same it shall be mandatory that said board act within a period not exceeding 90 days from the date of the suspension order of the Governor. In all cases of clemency, pardons and paroles, a majority vote of the members is sufficient for approval, except in cases involving capital punishment, and

in such cases a unanimous vote of all members of the Board is necessary. Provided, however, if any member for any cause is unable to serve in any case involving capital punishment the Governor shall act as the third member of said Board and the action so taken in such instances shall be by unanimous vote. In the cases which the Board has power to consider, such Board shall be charged with the duty of determining what prisoners serving sentences in the jails and prisons and public works camps of this State may be released on pardon or parole, and affixing the time and conditions thereof. The Board shall also be charged with the duty of supervising all persons placed on parole; or determining violations thereof and of taking action with reference thereto; of making such investigations as may be necessary and of aiding parolees or probationers in securing employment. It shall be the duty of the Board personally to study those prisoners whose cases the Board has power to consider, who may be confined in the jails, prisons and public works camps of the State, so as to determine their ultimate fitness for such relief as the Board has power to grant. Provided, however, that the Board by an affirmative vote of two of its members shall have the power to commute a sentence of death to one of life imprisonment."

"Section 13. * * * No prisoner shall be released on probation or placed on parole until and unless the Board shall find that there is reasonable probability that, if he is so released, he will live and conduct himself as a respectable and law-abiding person, and that his release will be compatible with his own welfare and the welfare of society. No person shall be released on pardon or placed on parole unless and until the Board is satisfied that he will be suitably employed in selfsustaining employment, or that he will not become a public charge. Any person who may be paroled shall be released on such terms and conditions as

the Board shall prescribe. The Board shall diligently see that no peonage is allowed in the guise of parole relationship or supervision. Such parolee shall remain in the legal custody of the Board until the expiration of the maximum term specified in his sentence or until he is pardoned by the Board. In the event a parolee violates the terms of his parole, he shall be subject to rearrest and/or extradition for placement in the actual custody of the Board to be redelivered to any prison or public works camps of this State."

"Section 18. No person who has been placed on parole shall be discharged therefrom by the Board prior to the expiration of the term for which he was sentenced, or until he shall have been duly pardoned in accordance with the law. The Board may, however, relieve a person on parole from making further reports and may permit such person to leave the State or county if satisfied that this is for his own best interest and for the best interest of society. When a parolee has, in the opinion of the Board, so conducted himself as to deserve a pardon or a commutation of sentence or the remission in whole or in part of any fine, forfeiture or penalty, the Board may grant such relief in cases within its power."

"Section 21. Following the effective date of this Act, the Governor of Georgia shall have the power and authority to suspend the execution of sentences of death or sentences in cases of treason. *The Governor shall have no authority or power whatever* over the granting of pardons or paroles." (Emphasis ours.)

"Section 23. The Board many (may) adopt and promulgate rules and regulations, not inconsistent with the provisions of this Act, touching all matters herein dealt with, including, among others, the practice and procedure in matters pertaining to paroles, pardons, probations and remission of fines and forfeitures."

"Section 32. The granting of reprieves and pardons, under the conditions of this Act shall be subject to approval by the Governor until such time as Article 5, Section 1, paragraph 12 taking this authority from the Governor, shall have been ratified."

3

The judgment and decree sought to be reviewed was entered by the Supreme Court of Georgia on the 21st day of November, 1944, and this appeal is presented on the 9th day of January 1945.

The judgment appealed from is a final judgment of the Supreme Court of Georgia, the state court of last resort and the highest state court in the State of Georgia having jurisdiction of said cause.

4

Johnny J. Jones, appellant herein, was indicted, tried, and convicted in the Superior Court of Fulton County, Georgia, on the 8th day of May, 1942, on a charge of perjury, and the judgment of the trial court was affirmed by the Court of Appeals of Georgia on the 29th day of March, 1944. While said appeal was pending in the Court of Appeals of Georgia, the Legislature of Georgia proposed to the voters of the state an amendment to the Constitution striking the provision set out in paragraph 2 hereof from the State Constitution, and substituting in lieu thereof the new provision set out in paragraph 2.

Thereafter, said amendment was submitted to the voters and was adopted on the 3rd day of August, 1943, and duly proclaimed a part of the Constitution.

Thereafter, on the 29th day of March, 1944, the Court of Appeals of Georgia affirmed the judgment of the trial court.

When Johnny J. Jones, appellant, was taken into custody by M. Gary Whittle, Sheriff of Richmond County, Georgia, for the purpose of serving the sentence imposed as a result of said conviction, appellant presented to the Judge of the City Court of Richmond County, Georgia, a petition for writ of habeas corpus in which he alleged the above facts and alleged that at the time he was convicted of the offense for which he was being incarcerated the Governor of Georgia was the only person authorized by law to grant to him a pardon. That the amendment to the Constitution withdrawing this power from the Governor and vesting it in a State Board of Pardons and Paroles was as to him an ex post facto law and, therefore, unconstitutional and void as a violation of Article 1, Section 10, Paragraph 1 of the Constitution of the United States reading as follows:

"No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and Silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the obligation of Contracts, or grant any Title of Nobility."

That appellant further alleged that said change in the Constitution of the State of Georgia deprived appellant of a valuable and valid legal constitutional right, of having the Governor of the State of Georgia pass upon the right of appellant to be reprieved, pardoned, or paroled, and that said change in the Constitution was a substantial withdrawal of appellant's rights and placed him at a decided disadvantage in requiring that he convince three persons of his right to have his sentence commuted or a pardon granted instead of the one person as guaranteed to him under the Constitution of the State of Georgia at the time of his con-

viction, and that such change in the Georgia Constitution altered the situation to his disadvantage and withdrew a substantial protection which surrounded him at the time of the commission of the alleged offense.

He further alleged that he was further substantially injured because the said Board of Pardons and Paroles had adopted a rule that it would not hear or consider an application for pardon except where it was satisfactorily shown to the Board that the applicant was innocent of the crime charged and that they would not consider an application for parole until the person incarcerated had served one-third of the sentence imposed, whereas, the Governor had the unlimited power to grant a pardon whether the accused was innocent or guilty, and to grant a parole before the service of any portion of a sentence.

Appellant further alleged that said Georgia Laws of 1943 (1943 Georgia Laws, page 185) above referred to were ex post facto, unconstitutional, and, therefore, void because at the time of the commission of the crime for which appellant was convicted the law of Georgia provided that after a prisoner had been paroled, and had served twelve months of his parole in a satisfactory manner, that he was eligible for a full pardon, after which his citizenship would be restored to him and he would not again be subject to rearrest for the violation of the conditions of his parole, whereas, Section 13 of the Acts of the Legislature of Georgia for 1943, at page 185, provides that a parolee shall remain in the legal custody of the Board of Pardons and Paroles until the expiration of the maximum term specified in his sentence, or until he had shown his innocence and received a pardon.

It was further alleged that under the rules adopted by said board of pardons and paroles, a pardon would be granted only to that individual who could satisfactorily prove inno-

cence of the crime for which he was serving time or had served time, and that the board would consider the restoration of civil and political rights only where the prisoner had satisfactorily completed the service of the maximum sentence under a parole issued by the board.

Upon a hearing of said petition for writ of habeas corpus, the court sustained the writ and discharged appellant from custody.

The State excepted to and entered an apeal from the judgment of the City Court of Richmond County, Georgia, to the Supreme Court of Georgia where the Supreme Court of Georgia reversed the judgment of the trial court and directed that appellant be taken into custody again.

5

The Federal questions here sought to be reviewed were raised in the trial court in the petition for writ of habeas corpus (pages 1 through 7 of the record in the Supreme Court of Georgia) where the appellant attacked the above quoted amendment to the Georgia Constitution (Georgia Laws 1943, page 43) as being as to him ex post facto and, therefore, unconstitutional because in violation of Article 1, Section 10, Paragraph 1 of the Constitution of the United States, for the reason that the provision existing at the time of the commission of the alleged offense which authorized and empowered the Governor of Georgia to grant pardons and paroles, was stricken from the Constitution of Georgia, and a provision inserted in lieu thereof vesting this power in a Board of Pardons and Paroles.

In said petition, by amendment, (pages 24 through 26 of the bill of exceptions) appellant attacked the above quoted provisions of the Act of 1943 (Georgia Laws 1943, page 185) as being unconstitutional and void because they violated the Constitution of the United States, Article 1,

Section 10, Paragraph 1, which prohibits the enactment of an ex post facto law in that said act withdrew from petitioner the right, which existed under the laws of Georgia at the time of the commission of the alleged offense, of being granted a full pardon after having been under parole for twelve months, whereas, the Act of 1943 required that he serve the maximum term either in prison or on parole, and that during his maximum term he be subject to be rearrested upon the order of the Board of Pardons and Paroles and that during the term of his maximum sentence he be amenable to the rules, regulations and directions of said Board of Pardons and Paroles.

Appellant alleged that the said constitutional amendment and the legislative act changed the situation to his disadvantage and withdrew a substantial protection which surrounded him at the time of the commission of the alleged offense and was, therefore, ex post facto and violative of the Constitution of the United States.

The trial judge, having held said act and said constitutional amendment unconstitutional for the reasons assigned in said petition, the correctness of his rulings were presented to the Supreme Court of Georgia by the defendant in the trial court, appellee here, where it was held as follows:

"2. If an amendment to the constitution of this State which in effect takes from the Governor the pardoning power and places it in the hands of a board of pardons and paroles, is, as to a person convicted of a crime committed before the adoption of said amendment, an ex post facto law, contrary to the Constitution of the United States, the former provision in the State constitution would as to such person remain effective.

"3. When an amendment to the State constitution is silent as to whether it shall be given a retroactive opera-

tion, and if to do so, in certain instances, would render it void as being in effect an ex post facto law, it will be so construed as give it a prospective application only.

"4. This court will not pass on the constitutionality of a so-called law when it is challenged by a party whose rights are not affected thereby, nor until an attempt is made to exercise some right claimed under the provision sought to be attacked affecting the rights of the attacking party."

A certified copy of the full opinion is hereto attached, marked exhibit A, and made by reference thereto a part hereof.

A motion for rehearing was made and upon a consideration of the motion for rehearing the Supreme Court of Georgia denied said motion and adhered to its orginal opinion and judgment.

6

The questions involved in this appeal are substantial because of the constitutional amendment above referred to which deprives appellant of the right, which existed at the time of the commission of the alleged offense, of applying to the governor for a pardon and the legislative act extends the period of time which he is subject to the directions of the prison and parole board beyond that existing at the time of the commission of the alleged offense and changed the situation to his hurt and injury.

The questions here presented have not been passed upon by this court and appellant's rights thereunder have not been established.

7

It is respectfully submitted that the rulings of the Supreme Court of Georgia do not rest upon a substantial basis and that the decision rendered has the effect of avoiding a

decision on the Federal constitutional questions presented for the following reasons, to-wit:

That in deciding said case the Supreme Court of Georgia held:

"When an amendment to the State Constitution is silent as to whether there should be given retroactive operation and if to do so, in certain instances, would render it void as being in effect an ex post facto law, it will be so construed as to give it a prospective application only."

In rendering said decision, the court ignored and failed to give effect to the provisions of the Georgia Laws of 1943, page 185, as follows:

> "Section 21. Following the effective date of this Act, the Governor of Georgia shall have the power and authority to suspend the execution of sentences of death or sentences in cases of treason. The Governor shall have no authority or power whatever over the granting of pardons or paroles."
> "Section 31. This Act shall become effective upon its passage by the General Assembly and approval by the Governor."
> "Section 32. The granting of reprieves and pardons, under the conditions of this Act shall be subject to approval by the Governor until such time as Article 5, Section 1, paragraph 12 taking this authority from the Governor, shall have been ratified."

and ignored the following provision of the constitutional amendment of 1943 (Georgia Laws 1943, page 43) ratified at election held on the 3rd day of August, 1943, and duly proclaimed a part of the Constitution, which reads as follows:

> "Section 1. Upon approval of this Resolution in the manner hereinafter provided, that Paragraph XII of Section 1 of Article V of the Constitution of the State of Georgia, as follows:
> '2-2612. (6481) Paragraph XII. Reprieves and Pardons.

'He shall have power to grant reprieves and pardons, to commute penalties, remove disabilities imposed by law, and to remit any part of a sentence for offenses against the State, after conviction, except in cases of treason and impeachment, subject to such regulations as may be provided by law relative to the manner of applying for pardons. Upon conviction for treason, he may suspend the execution of the sentence and report the case to the General Assembly at the next meeting thereof, when the General Assembly shall either pardon, commute the sentence, direct its execution, or grant a further reprieve. He shall, at each session of the General Assembly, communicate to that body each case of reprieve, pardon, or commutation granted, stating the name of the convict, the offense of which he was convicted, the sentence and its date, the date of the reprieve, pardon, or commutation, and the reasons for granting the same. He shall take care that the laws are faithfully executed, and shall be a conservator of the peace throughout the State.'

"be, and the same is hereby amended, *by striking Paragraph XII of Section 1 of Article V*, as above set out, in its entirety, and that in lieu thereof a new paragraph to be substituted, to be known as Paragraph XII of Section 1 of Article V, and which shall read as follows:"

Then follows the new Amendment.

The last clause of the new Amendment reads:

"The General Assembly may enact laws in aid of, but not inconsistent with, this amendment."

The effect of the provision of said Constitution was to make the said legislative act a part of the constitutional amendment and to fix the effective date thereof and said act, passed pursuant to said authority and being consistent with the constitutional amendment, deprived the governor, from and after the adoption of said constitutional amendment, of authority to grant pardons, paroles and reprieves, and in fact made said constitutional amendment retro-

active and gave it a retroactive application in so far as appellant's rights were involved.

Because the Supreme Court of Georgia ruled:

> "2. If an amendment to the constitution of this State which in effect takes from the Governor the pardoning power and places it in the hands of a board of pardons and paroles, is, as to a person convicted of a crime committed before the adoption of said amendment, an ex post facto law, contrary to the constitution of the United States, the former provision in the State constitution would as to such person remain effective."

In making said ruling and in holding that the former provision in the State Constitution would as to such persons remain effective, the court ignored and failed to give effect to the plain provision of the Resolution (Georgia Laws 1943, page 43) submitted said amendment, which provides by its terms that "Upon approval of this Resolution in the manner hereinafter provided, that Paragraph XII of Section 1 of Article V of the Constitution of the State of Georgia," which was the provision of the Constitution governing the Governor's pardoning powers, "be, and the same is, hereby amended, by striking Paragraph XII of Section 1 of Article V, as above set out, in its entirety . . . "

The provision for approval of the Resolution above referred to is,

> "Section 2. When said amendment shall be agreed to by two-thirds vote of each House, with the 'ayes' and 'nays' thereon entered on their respective journals, it shall be published and submitted to the qualified voters of Georgia for ratification or rejection at the next general election at which constitutional amendments may be voted on, and if adopted, the result shall be declared and the amendment proclaimed as a part of the Constitution of the State of Georgia, as provided by the Constitution and laws relating to constitutional amendments."

The resolution was approved and the provision was stricken by proclamation of the Governor. The fact that the new provision was void as being retroactive and unconstitutional did not affect the provision repealing the prior constitutional provision with reference to the Governor's pardoning powers.

The repeal of the power of the Governor to grant appellant a pardon operated to deny appellant due process of law as set out in paragraph 15 of the original petition.

Because the Supreme Court of Georgia made the following ruling, to-wit:

> "4. This court will not pass on the constitutionality of a so-called law when it is challenged by a party whose rights are not affected thereby, nor until an attempt is made to exercise some right claimed under the provision sought to be attacked affecting the rights of the attacking party."

In making said ruling and in holding that there has not been an attempt to exercise some right claimed under the provision sought to be attacked affecting the rights of the attacking party, this court ignored the rules and regulations of the Board of Pardons and Paroles, which by its rules and regulations took jurisdiction of and undertook to pass on all applications for pardons and paroles regardless of whether the convict was serving time on a sentence for a crime committed prior to the adoption of said constitutional amendment, and ignored the provision of the Act of 1943 (Georgia Laws 1943, page 185), reading as follows:

> "Section 21. Following the effective date of this Act, the Governor of Georgia shall have the power and authority to suspend the execution of sentences of death or sentences in cases of treason. The Governor shall have no authority or power whatever over the granting of pardons or paroles."

"Section 32. The granting of reprieves and pardons, under the conditions of this Act shall be subject to approval by the Governor until such time as Article 5, Section 1, paragraph 12 taking this authority from the Governor, shall have been ratified."

This amendment to the Georgia Constitution was ratified August 3rd, 1943.

The effect of said rulings, wherein the plain language of the Georgia constitutional amendment and Georgia statute were ignored, was to avoid the Federal constitutional questions presented in the original petition and, the resting of the decision on non-Federal grounds was without fair support in the record.

Respectfully,

B. B. McCowen,
F. Frederick Kennedy,
Attorneys for Appellant.

APPENDIX "A"

SUPREME COURT OF GEORGIA

Decided October 6, 1944

Nos. 14956, 14958

WHITTLE, Sheriff,

v.

JONES, et vice versa.

BY THE COURT:

1. The motion to dismiss the writ of error in the main bill is denied.

2. If an amendment to the constitution of this State which in effect takes from the Governor the pardoning power and places it in the hands of a board of pardons and paroles, is, as to a person convicted of a crime committed before the adoption of said amendment, an ex post facto law, contrary to the constitution of the United States, the former provision in the State constitution would as to such person remain effective.

3. When an amendment to the State Constitution is silent as to whether it shall be given a retroactive operation, and if to do so, in certain instances, would render it void as being in effect an ex post facto law, it will be so construed as to give it a prospective application only.

4. This court will not pass on the constitutionality of a so-called law when it is challenged by a party whose rights are not affected thereby, nor until an attempt is made to exercise some right claimed under the provision sought to be attacked affecting the rights of the attacking party.

5. Every court has the inherent power to correct its own records to make them speak the truth.

6. The judgment of reversal of an order in a habeas corpus case discharging one from custody, carries with it

a reversal of the order of exhoneretur on a bail bond which the trial court improvidently permitted to be given after the petition was filed, the condition of the bond being his appearance upon the hearing of the habeas corpus case and responding to the judgment of the court thereon.

This is a habeas corpus case brought by Jones against the sheriff whom he alleged was illegally restraining him of his liberty, under a pretended sentence of Fulton superior court. The date of Jones' conviction was May 8, 1942. At that time, and at the date of the crime for which he was convicted, paragraph 12 of section 1 of article 5 of the constitution of this State provided that the Governor shall have power to grant reprieves and pardons, to commute penalties, remove disabilities imposed by law, and to remit any part of a sentence for offenses against the State, after conviction, except in cases of treason and impeachment, subject to such regulations as may be provided by law relative to the manner of applying for pardons. On August 3, 1943, a constitutional amendment was adopted which limited the foregoing power of the Governor to his right to suspend the execution of sentence of death after conviction until the State Board of Pardons and Paroles shall have an opportunity of hearing the application of the convicted person, and the further right in the Governor to suspend the execution of a conviction of treason and report the case to the General Assembly at the next meeting thereof, with the authority given the legislature then to either pardon, commute the sentence, direct its execution or grant a further reprieve. The same amendment created a State Board of pardons and paroles, lodging with them the power to grant reprieves, pardons and paroles, to commute penalties, remove disabilities imposed by law, and to remit any part of a sentence for any offense against the State after conviction, except in cases of treason or impeachment, and except in cases in which the Governor refuses to suspend a sentence of death. The boards were given authority to make such rules and regulations as may be authorized by law. A copy of the rules of the board is attached to the application for habeas corpus. Among the rules are, one,

that a pardon will be granted only to that individual who can satisfactorily prove his innocence; another, that applicants for commutation must furnish the board with a transcript of the record and evidence, and a third, one which in effect provides that persons convicted of a felony will only become eligible to apply for a parole consideration upon completion of one third of the minimum sentence.

The applicant, with respect to the change in the constitution, takes this position: That that portion of the constitution of the State of Georgia is ex post facto and retroactive as to him, and there has been substituted in lieu of the Governor a State Board of Pardons and Paroles composed of three members appointed by the Governor as the only board or persons authorized under the constitution as amended to reprieve, pardon, or commute the penalty against applicant. That said amendment is void and unconstitutional as against him and is in violation of article 1, section 10, paragraph 10 of the constitution of the United States, which prohibits a State from entering into any treaty, alliance, or confederation; from granting letters of marque and reprisal; from coining money, and emitting bills of credit; from passing any bill of attainder, ex post facto law, or law impairing the obligations of contracts, or granting any title of nobility. That the amendment deprives him of a valuable and valid legal and constitutional right of having Governor of the State pass upon his right to be reprieved, paroled, or pardoned. That said amendment is a substantial withdrawal of petitioner's rights and places him at a disadvantage and requires that he convince three persons of his right to have his sentence commuted or a pardon granted instead of the one person as guaranteed to him under the constitution at the time of his conviction. That he is further injured as a result of said change because the Board of Pardons and Paroles created by the amendment, and appointed by the Governor, has adopted a rule that they will not hear or consider an application for pardon, except where it is satisfactorily shown to them that the accused is innocent of the crime charged, or reprieve or parole until the person incarcerated has served one-third of the sentence imposed, whereas, the Governor had the

unlimited power to grant a pardon whether the service of the person was innocent or guilty and to grant a parole before any portion of the sentence. That petitioner has been deprived of an opportunity to raise and have decided the legal rights above asserted because said amendment was voted upon and adopted after petitioner's motion for new trial had been overruled and after the case had been appealed to the Court of Appeals of Georgia, and that petitioner could not present said question in that court because that court and the Supreme Court of Georgia refuse to hear, consider, and pass upon any question not presented in the trial court. That as applied to applicant said amendment deprives him of due process of law as guaranteed to him under the constitution of the United States, to the effect that persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside; and which forbids any State from making or enforcing any law which abridges the privileges or immunities of citizens of the United States, from depriving any person of life, liberty, or property, without due process of law, and from denying any person within its jurisdiction the equal protection of the laws.

Petitioner asked that he be given his discharge, and on the hearing, he was discharged from custody. The sheriff excepted. Jones filed a cross-bill.

In the cross-bill, Jones excepts to the overruling of his demurrer to the part of the response which set up that the sentence of petitioner had been amended on May 10, 1944; also to the ruling admitting in evidence the amended sentence; and to the holding that the sentence imposed for perjury instead of subornation of perjury is not void because of the difference in the name of the sentence, and to the overruling of his prayer for a discharge on this ground. The record shows that Jones was indicted in Fulton superior court for the offense of subornation of perjury, the indictment containing two counts, and bearing the clerk's number 54654; that he was tried on said charge and by the jury convicted on both counts, the verdict fixing the penalty. He was sentenced, in accordance with the jury's verdict. The sentences bear the same case number as the indictment,

but each refers to the crime as perjury. He filed a motion for new trial, the orders thereon bearing the same case number, which was overruled. He carried his case to the Court of Appeals, the bill of exceptions reciting that he had been tried for the offense of subornation of perjury and convicted of said offense. The case was affirmed by the Court of Appeals. Two days after the petition for habeas corpus was presented, but before hearing was had thereon, a written motion was filed by the solicitor-general, which recited that by clerical error and inadvertence in preparing the forms of the sentence, they were headed, "Sentence: Subornation of perjury," the words "subornation of" being omitted, that the sentences were imposed on the verdict which found Jones guilty of subornation of perjury, on an indictment charging him therewith, and praying that the sentences be amended by inserting at the top of each, between the word "charge" and the word "perjury" the words "subornation of." Acting thereon, on the same day, the judge of Fulton superior court entered an order which recited that it appeared from an inspection of the record that the allegations of the motion were true, and ordered that the sentences be amended as prayed. This was done at a term of court subsequent to the one during which the original sentences were entered, and apparently without notice to Jones. Original sentences as recorded on the minutes were headed as follows: "Sentence: Charge—Sub. Perjury, Fulton superior court May term, 1942. No. 54654. The State v. Johnny J. Jones. Verdict of guilty."

Grice, Justice. 1. There is a motion to dismiss the writ of error in the main bill on two grounds, first, that the evidence adduced upon the trial of the case and incorporated in the bill of exceptions has not been verified as required by the rules and the statutes, and second, because there is no exception to any final judgment. An examination of the bill of exceptions discloses not only a bona fide effort to eliminate the immaterial, but a successful attempt to do so. Counsel must be allowed some latitude and some discretion in making up a summary of the evidence to be incorporated. No abuse of it is here shown. The final judgment was the one granting the writ of habeas, and discharging Jones

from custody. There are in the bill of exceptions a number of special assignments of error on the final judgment. The motion to dismiss is denied.

2. It is insisted by the applicant that the new constitutional provision as to pardons works to his disadvantage, is a substantial withdrawal of his rights, and since he was convicted prior to the adoption of the amendment, that it is as to him an ex post facto law. But if it should for the moment be assumed that such position be a sound one, does it follow that he was entitled to his freedom under the habeas corpus proceeding? If it is in effect an ex post facto law when applied to him, then the amendment is of no effect in his case, because it collides with a provision of the Federal Constitution which declares that no State shall pass any such law. The attempt to amend the State constitution as to the matter here involved would be an abortive effort and that instrument would remain in force as it was before the so-called amendment was adopted. Where does his position lead him? He desires the court to declare as to him the amendment void. If it were to be so adjudged, then the power of the Governor to grant him a pardon would remain unaffected, and no such authority would rest in a board of pardons and paroles. If he is right in his view that the amendment is as to him an ex post facto law, it is obliged to follow that his right to apply to the Governor for a pardon, and the Governor's power to grant it, is the same as on the day of his conviction, and before. For this reason alone he is not entitled to be discharged from custody on the ground that since the crime was committed an ex post facto law has been passed which works to his disadvantage.

3. Again, in order to make his contention that the amendment is, as to him, an ex post facto law, he assumes that under the amendment, the Governor's right to pardon those who were convicted of crime prior to its adoption was withdrawn. The amendment is silent as to this. If to apply it to all convicts, those convicted of crimes committed before as well as after its adoption, would make it as to him an ex post facto law, then the amendment would not be given retroactive operation. It is a well known principle that a statute will not be construed in such a way as to make it

unconstitutional, if it can be avoided, and is never to be given a retroactive operation unless such construction be absolutely demanded. Bank of Norman Park v. Colquitt County, 169 Ga. 534. The reason of the rule is applicable when construing a provision of a State constitution against an attack thereon based on a contention that it violates the Federal constitution. 16 C. J. S. p. 81. If the amendment be void if applied to cases where convictions were had before its adoption, then since the amendment is silent as to whether it is only intended to affect those subsequently convicted, it will be presumed that it was not intended thereby to apply to those cases where, if it were applied, it would have the effect of an ex post facto law. Compare Conyers v. Commissioners of Roads and Revenues of Bartow County, 116 Ga. 101; Bond v. Munro, 28 Ga. 597.

The amendment under attack repealed the existing provision as to the Governor's pardoning power. A repealing act will not be given a retroactive operation so as to divest previously acquired rights. Dennington v. Mayor and Council of Roberta, 130 Ga. 494. So, it would seem that if applicant be correct in his contention that the amendment undertook to deprive him of a substantial right, the answer would be that the amendment, if such be its effect, would not be given a retrospective operation so as to include him.

4. The Supreme Court will not pass on the constitutionality of a so-called law when it is challenged by a party whose rights are not affected by it. Hazleton v. City of Atlanta, 147 Ga. 207; Witherow v. Board of Drainage Commissioners, etc., 155 Ga. 476; Webb v. City of Atlanta, 186 Ga. 430. Nor until an attempt is made to exercise some right claimed under the provision under attack affecting the rights of the attacking party, will the courts pass upon the validity of the same. Toney v. Mayor and Council of Macon, 119 Ga. 83; Carswell v. Wright, 133 Ga. 714; Owens v. Watkins, 189 Ga. 311. Comity to a cordinate department of the government requires of courts that cases shall not be disposed of on constitutional grounds, when it is possible to avoid such question, without a sacrifice of the rights of parties. Board of Education of Glynn County v. Brunswick, 72 Ga. 353.

An endeavor has been made in previous portions of this opinion to demonstrate that if Jones should be correct in his contention that the amendment referred to, in so far as it affects him, is in effect an ex post facto law, and therefore unconstitutional, he is given no right to be discharged from custody, but that the constitution as it was before the amendment, is as to him still of force. Also we have endeavored to show that if it would be as to him an ex post facto law, it was not be supposed that it was intended to act retroactively, but to be limited in its operation to those convicted after its adoption. If the correctness of either the above propositions has been demonstrated, it follows that there is no necessity for passing on the constitutional question raised by him, for he has by the amendment been denied no right or privilege which he had before.

In thus declining to pass upon the constitutional question, it should be made clear that we have assumed only for the sake of argument the correctness of his contention that the new provision contained in the amendment is as to him as ex post facto law and void. But in any view of the matter, the ratification by the people on August 3, 1943, of an amendment to the State constitution, placing the pardoning power in a board of pardons and paroles, did not have the effect of discharging from custody all persons convicted by the courts prior thereto. The judge erred in giving him his freedom on the hearing of his applicaton for habeas corpus.

5. It is clear from this record that Jones was sentenced for the crime for which he was tried and convicted, to wit, subornation of perjury, and that by a mere clerical error the crime was otherwise described in the sentence.

Every court has the inherent authority to correct its own records to make them speak the truth. Ellis v. Clarke, 173 Ga. 618; Grand Chapter, etc. v. Wolfe, 175 Ga. 867; Beecher v. Carter, 189 Ga. 234. In Ellis v. Clarke, supra, the amendment was made pending the habeas corpus hearing before a judge of a city court, and this court held that the habeas corpus court did not err in suspending the hearing until the minutes of the superior court could be corrected, nor did he err in admitting in evidence the certified copy of

the order of the judge of the superior court amending its minutes, on the ground that it was not a "nunc pro tunc" order. The report of that case shows that the order was entered several terms of court after the minutes were originally entered.

The correction in the instant case was made from an inspection of the record, to make the sentences conform to the actual record. No issue of fact was involved, and that the order correcting the same was made ex parte makes no difference.

But if the sentences had been void, a verdict of guilty appearing in the record, it would seem that this would not entitle him to his discharge on habeas corpus. He stands convicted of a crime, and if no sentence had been rendered, or if the one that was passed was void, and the correction did not cure it, the proper procedure apparently would have been to remand him to be sentenced for his crime. See Morris v. Clark, 156 Ga. 489, and the authorities there cited.

6. After the application for habeas corpus was filed, the judge permitted the applicant to be released on bail, he giving bond conditioned upon his appearing at the hearing and responding to the judgment of the court thereon. He was therefore released from custody, and was at large under said bond at the time of the habeas corpus trial, he appearing in court however and attending said trial, and thereafter remaining at liberty under said bond.

One of the reasons urged by respondent's counsel why it was error to discharge the applicant was that he was not in custody at the time the case was heard. We have not dealt with that in the opinion because it was deemed unnecessary. Plaintiff in error assigns error, however, also on that part of the judgment under review which adjudges that the petitioner having appeared in court pursuant to the terms of the bond, that said bond be discharged and satisfied. We know of no law authorizing the judge to release on bail a person convicted of crime, pending the determination of the issue raised by his application for habeas corpus. See Hames v. Sturdivant, 181 Ga. 472 and Johnson v. Aldridge, 192 Ga. 209, and the authorities there cited. The exception to that part of the judgment having to do

with the discharge and satisfaction of the bond is, howev
well taken. Now that the attention of the trial judge
called to the fact that there was vested in him no author
to release him on bail, and the judgment of this co
being that he was not entitled to his discharge on hab
corpus, it may be anticipated that the trial judge w
so far as it may be in his power, give such further directi
in the matter as will restore the status as it was immediat
before the filing of the petition for habeas corpus.

Judgment on main bill reversed. Judgment on cross
affirmed. All the Justices concur.

(6893)

FILE COPY

FEB 28 1945

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 976

JOHNNY J. JONES,

Appellant,

vs.

M. GARY WHITTLE, AS SHERIFF OF RICHMOND COUNTY, GEORGIA

Appellee

APPEAL FROM THE SUPREME COURT OF GEORGIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

And now comes M. Gary Whittle, as sheriff of Richmond County, Georgia, and pursuant to Rule 12, par. 3 of Rules of Supreme Court of the United States, files this his statement against the jurisdiction of the Supreme Court of the United States, and this his motion to dismiss the appeal in this cause, for grounds thereof alleging:

(1) The Supreme Court of Georgia has not passed upon any Federal question in this case.

(2) The Supreme Court of Georgia has decided the case upon non-Federal grounds adequate to sustain its decision, holding that under Georgia law Jones is not entitled to be discharged upon habeas corpus irrespective of whether the power to grant him pardon or parole is now lodged in the Governor of Georgia or the Board of Pardons and Paroles. *Adams* v. *Russell, Warden,* 229 U. S. 353, 57 L. ed. 1225; *People* v. *Atwell,* 261 U. S. 590, 67 L. ed. 814; *McCoy* v. *Shaw,* 277 U. S. 302, 78 L. ed. 891.

Wherefore, it is prayed that the appeal be dismissed.

E. E. Andrews,
Sol. Gen'l,

Durwood T. Pye,
Asst. Sol. Gen'l,

Reuben A. Garland,
Attorneys for M. Gary Whittle, as Sheriff of Richmond County, Georgia.

Court House, Atlanta, Ga.
605 Peters Bldg., Atlanta, Ga.

No. 976. JONES *v.* WHITTLE, SHERIFF. Appeal from the Supreme Court of Georgia. April 2, 1945. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the reason that the judgment of the court below is based upon a non-federal ground adequate to support it. *Mr. Benjamin B. McCowen* for appellant. *Mr. Reuben A. Garland* for appellee. Reported below: 198 Ga. 538, 32 S. E. 2d 94.